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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

TEXACO INC., AMERADA PETROLEUM CORPORATION, GULF OIL CORPORATION, JAKE L. HAMON, HUMBLE OIL & REFINING COMPANY, SOHIO PETROLEUM COMPANY, EMORY M. SPENCER,

Petitioners,

v.

FEDERAL POWER COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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HUMBLE OIL & REFINING COMPANY,
SOHIO PETROLEUM COMPANY, EMORY M. SPENCER,
Petitioners,

v.

FEDERAL POWER COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit, entered on June 24, 1963.

OPINION BELOW

The opinion of the Court of Appeals (App., *infra*, pp. 1a-5a, is reported at .... F. 2d .....

JURISDICTION

The judgments of the Court of Appeals granting motions to dismiss below were entered on June 24, 1963 (App.,

infra, p. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

If evidence proffered by a party to a Federal Power Commission adjudicatory proceeding is rejected, or if relevant evidence is withheld from a party by the Commission, does an appropriate court of appeals have jurisdiction, before issuance of the final agency order on the merits, to entertain an application and motion to adduce the rejected and withheld evidence, and, indeed, must not such action be entered promptly to avoid waiver of the Commission error?

STATUTE INVOLVED

Section 19(b) of the Natural Gas Act, 52 Stat. 831; 15 U.S.C. 717r(b) provides, in part, as follows:

> "Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part . . . If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such

> additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order."

STATEMENT

There are now pending before the Federal Power Commission several adjudicatory proceedings involving individual applications by the several petitioners here for certificates of public convenience and necessity which would authorize the initiation of sales of natural gas in interstate commerce pursuant to petitioners' individually-negotiated contracts. These proceedings are designated as *Amerada Petroleum Corporation, et al.*, Docket Nos. G-62-1544, *et al.* It has become the practice of the Commission to consolidate for a single hearing a number of pending certificate applications proposing the initiation of sales in a general production area. The *Amerada* proceeding involves a number of applications for sales from the southern Gulf Coast area of the State of Texas and each petitioner here is a party applicant in that proceeding.

The *Amerada* proceedings were instituted pursuant to Section 7 of the Natural Gas Act and the Commission's order of August 30, 1962. This order provided in pertinent part:

> "In such a hearing all the applicants will have an opportunity to show whether the appropriate price at which they should be permanently certificated should be limited to the 15 cent per Mcf price we found to be the in-line price as of September 28, 1960, the 16 cent

per Mcf price which is being adopted as the future area ceiling price for this area, or the 18 cent per Mcf price established on September 28, 1960." (P.R. 3a-4a)[1]

Having been informed that its contractual rights to certain prices were subject to "limitation" by prices published by the Commission in its *Statement of General Policy No 61-1*, 24 F.P.C. 818, and the *Fifth Amendment to Statement of General Policy No. 61-1*, 28 F.P.C. 441 (P.R. 7a-12a), Texaco instituted steps to ascertain the data relied upon by the Commission for the derivation of each of these price "limitations." The two Statements had been issued without record or hearing, and it was thus necessary to seek revelation of the data so that Texaco could properly prepare its case and intelligently comment on whether its sales prices should be "limited" by the prices cited by the Commission order. Texaco's efforts to reach this data and place it in evidence were made through an application for disclosure of these materials pursuant to the Commission's Rules, 18 C.F.R. 1.36(e), and for subpoenas *duces tecum* and *ad testificandum* to the Secretary of the Commission under the Natural Gas Act, 15 U.S.C. 717m, the Commission's Rules, 18 C.F.R. 1.23, and the Administrative Procedure Act, 5 U.S.C. 1005(c) (P.R. 16a-31a).

The Commission took no action on Texaco's motion for disclosure and subpoena, and after thirty days the motion was deemed denied under the Commission's Rules, 18 C.F.R. 1.12(e). Texaco promptly submitted an application for rehearing and reconsideration of this denial, pointing out the importance to it of knowing the data which would be used to condition and limit its contract rights so that it could

[1] "P. R." refers to the printed Petition and Appendix filed by petitioner Texaco Inc. in the Court of Appeals in No. 17,608. "M.R." refers to the mimeograph Petition and Appendix filed by petitioners in the Court of Appeals in No. 17,652.

properly participate in the hearing. (P.R. 41a-42a). By order of January 30, 1963, the Commission denied rehearing and refused production of the data (P.R. 44a-52a).

On February 11, 1963, Texaco petitioned the Court of Appeals for the District of Columbia for leave to adduce this additional data and for writ of mandamus or other appropriate relief, pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b) (P.R. 1). Judicial assistance was sought in reaching the data behind the "limiting" prices established by the Commission and in insuring acceptance of the data into the record of the certificate proceeding.

Although these efforts were directed toward reaching matters considered vital to the full preparation of its case, Texaco did proceed, in conjunction with the other petitioners here, to prepare such other evidence as it could from other available data. Petitioners gathered substantial evidence which they considered to be relevant to the issues of present or future public convenience and necessity as defined in the decisions of the courts, and the Commission's own prior decisions, and, particularly, the recitation of "relevant facts" relied upon by the Commission when promulgating its *Statement of General Policy* (P.R. 22a).

Included among the evidence prepared for presentation was:

(1) testimony and exhibits of a practicing geologist relating the gas production prospects of the pertinent producing area and a chronicle of the shift from shallow to deep gas production. (M.R. App., pp. 7-8).

(2) testimony and exhibits of a fuels economist showing projections of demand for natural gas, and thus, present demands on exploration and production companies (M.R. App., p. 9).

(3) testimony and exhibits of a consulting economist detailing national and regional trends in exploration and development, petroleum prices and costs, productivity of drilling and gas supply (M.R. App., pp. 10-11),

(4) testimony and exhibits of a producing company managerial witness computing reasonable current requirements for financing new supplies of natural gas (M.R. App., pp. 12-13).

(5) testimony of a production engineer comparing costs of drilling and completing old producing sources with problems and costs related to the bringing of new sources to market (M.R. App., p. 14).

All of this testimony and exhibit material was available on the day set for initiation of the hearing on petitioners' applications for certificates of public convenience and necessity. By ruling issued December 6, 1962, the Hearing Examiner rejected the tendered evidence. (M.R. App., pp. 53-75). Petitioners immediately sought an appeal from this ruling of the Hearing Examiner pursuant to the Commission's Rules, 18 C.F.R. 1.28(a). By letter dated January 12, 1963, the Secretary of the Commission rejected this appeal. (M.R. App., p. 76).

On February 19, 1963, petitioners filed their joint petition with the Court of Appeals for leave to adduce evidence (M.R. p. 1). Like Texaco's earlier filed petition for leave to adduce, this filing relied upon the specific language of Section 19(b) of the Natural Gas Act permitting a court of appeals to order that additional evidence be adduced. In each case the producers' efforts to secure and present evidence at an agency proceeding had been rebuffed, and believing that decisions of this Court, as well as decisions of courts of appeals, required immediate recourse by means of petitions to adduce, such relief was sought.

In each instance the Commission filed a motion to dismiss the petitions to adduce, and because of their similarity, the Court of Appeals heard and considered the cases jointly, issuing a single order on June 24, 1963, granting the Commission's motions and dismissing the petitions. Senior Circuit Judge Prettyman dissented to the dismissal.

Each of the judges expressly reserved the right to file an opinion or statement of his views, but only Judge Prettyman has done so — this in a memorandum of dissent filed on the day the order of dismissal was entered.

Judge Prettyman stated, *inter alia*, in his dissent:

> ". . . it seems to me we are bound by the ruling of the Supreme Court in the *Consolidated Edison* case.[1]
>
> . . . . . .
>
> ". . . It seems to me that the Supreme Court said quite clearly that if proffered evidence is rejected the profferor has an exclusive remedy, which is a motion in the Court of Appeals for leave to adduce the evidence, and if he does not make that motion he cannot raise the point upon a petition to review the final order."

---

[1] Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197 (1938)."
App., *infra*, pp. 2a, 4a-5a.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is in conflict with the decision of this Court in *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197 (1938); and the interpretation in *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961).

The decision of the Court of Appeals is in conflict with that Court's own decision in *Communist Party of the United States v. Subversive Activities Control Board*, 245 F. 2d

314; and with the decisions of the Third, Fourth, Eighth and Ninth Circuits in *Hershey Chocolate Corp.* v. *Federal Trade Commission*, 121 F. 2d 968; *National Labor Relations Board* v. *Fairchild Engine & Airplane Corp.*, 145 F. 2d 214; *Wilson & Co.* v. *National Labor Relations Board*, 103 F. 2d 243; *California Lumbermen's Council* v. *Federal Trade Commission*, 115 F. 2d 178, *cert. denied* 312 U.S. 709.

The decision of the Court of Appeals raises serious Constitutional questions since true due process of law requires a clear pronouncement of when court review must be sought to avoid waiver of the right to judicial review.

The decision of the Court of Appeals raises a fundamental question of the interpretation of the judicial review protections of not just the Natural Gas Act, but also, Federal Power Act, 16 U.S.C. 825 (1)(b); National Labor Relations Act, 29 U.S.C. 160(e); Securities and Exchange Act, 15 U.S.C. 77(i)(a); Federal Trade Commission Act, 15 U.S.C. 45(c); Subversive Activities Control Act, 50 U.S.C. 793; and the omnibus agencies act, 5 U.S.C. 1037(c).

1. Conflict with Decisions of this Court

In *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, this Court considered a proceeding brought to review a cease and desist order issued by the Labor Board. The government successfully argued both to the Second Circuit [95 F. 2d 390] and to this Court that the failure of the petitioners there to apply for leave to adduce the particular evidence foreclosed a later complaint that the Board's refusal to receive "highly important" evidence deprived them of procedural due process. This Court held:

> "We agree with the Court of Appeals that the refusal to receive the testimony was unreasonable and arbi-

trary. Assuming, as the Board contends, that it had a discretionary control over the conduct of the proceedings, we cannot but regard this action as an abuse of discretion. But the statute did not leave the petitioners without remedy. The court below pointed to that remedy, that is, to apply to the Court of Appeals for leave to adduce the additional evidence; on such an application and a showing of reasonable grounds the court could have ordered it to be taken. Section 10(e)(f). Petitioners did not avail themselves of this appropriate procedure." 305 U.S. at 226.

Yet petitioners here, availing themselves of that appropriate procedure, have been dismissed without opinion.

In 1961 this Court again had occasion to consider its interpretation of the "appropriate procedure" under such statutes as govern petitioners' actions here. At that time this Court considered, for the second time, matters relating to the Communist Party. The court had before it the decision of the Court of Appeals for the District of Columbia in *Communist Party of the United States v. Subversive Activities Control Board*, 254 F. 2d 314.[2] When this Court came to review this decision, it never reached the specific question which had occupied the Court of Appeals in this area since it found waiver of the alleged error on other grounds. 367 U.S. 1, 32. However, it was recognized here that the lower court:

> ". . . said that the Party's exclusive remedy was to move the Court of Appeals . . . for leave to adduce

[2] The decision of the Court of Appeals had been written by Judge Prettyman, who, now sitting as Senior Circuit Judge, dissented to dismissal of petitioners' causes below. It was at the time of the preparation of his 1958 decision that Judge Prettyman was presented with the argument of the government recounted in his dissent in these matters. (App., *infra*, pp. 3a-4a). The Court of Appeals accepted the argument at that time, and "Upon re-examination of the question and a re-reading of the cases cited, [Judge Prettyman] is still of the same opinion." (App. *infra*, p. 4a).

> additional evidence, and that failure to make such a motion at the time when the Board refused to order the documents produced barred the Party from later challenging the action of the Board." 367 U.S. at 30.

At the time of this Court's 1961 *Communist Party* decision, the Chief Justice also took occasion in his separate statement to comment upon *Consolidated Edison*.

> ". . . In [Consolidated Edison] an examiner for the Labor Relations Board refused to permit one of the parties to a proceeding to offer the testimony of two witnesses who had not been scheduled to appear . . . This Court recognized that the examiner's action was arbitrary, but nevertheless, it held that the party's *sole remedy* in such a situation was to make a motion for leave to adduce the additional testimony of the proffered witnesses, and that by *having failed* to pursue that remedy, *the party waived its objection*.
>
> ". . . Not only did the decision permit a clearly arbitrary ruling of an examiner to stand uncorrected, but it also *established a* cumbersome *procedure* whereby resort to the Court of Appeals was required every time the Board excluded evidence which the offering party thought should have been admitted." 367 U.S. at 121-122 (emphasis added).

Chief Justice Warren then commented that it was not necessary for this Court "to re-evaluate" the holding of *Consolidated Edison* at that time since he felt that the holding was limited to situations in which a party sought to introduce evidence which he had acquired independently. The situation here is that petitioners did have evidence which they had acquired and prepared independently, and which they have urged is vital to their case. Thus, even within this more narrow application of *Consolidated Edison*, the decision below is directly in conflict with that decision of this Court.

2. Conflict with Other Circuit Court Decisions

The opinion below was issued without statement from the majority. However, some indication of what prompted these holdings is available from the comments of Judge Prettyman's dissent:

> "I agree with my brethren that the granting at this stage of the proceedings of the petitions for leave to adduce additional evidence before the Commission would have several unfortunate results in relation to or affecting administrative procedure." (App., *infra*, p. 2a).

These same problems plagued Judge Prettyman when he wrote *for the majority* in 1958, and said in *Communist Party*:

> "As we read the opinion and decision in the Consolidated Edison case it means that, when proffered evidence is denied receipt . . . the profferor must apply . . . for permission to adduce the additional evidence; if he fails so to move he cannot . . . present the point on appeal . . .
>
> "It may be said that the ruling we have just outlined creates a right to interlocutory relief. . . There is much force to these various suggestions, and perhaps we misconstrue the opinion of the Supreme Court. But we are bound by the opinion as we read it." 254 F. 2d at 325.

As Judge Prettyman had read this Court's decision, so had petitioners.

As Judge Prettyman had read this Court's decision, so had at least four other circuit court panels.[3] After *Consoli-*

[3] As noted in the dissent below, the Government urged that the view adopted by Judge Prettyman in *Communist Party* was shared by "nine cases in which . . . Circuit Courts of Appeals had so construed the *Consolidated Edison* case." App., *infra*, p. 4a.

dated Edison, one court of appeals after another was persuaded by counsel for the Federal Trade Commission and the National Labor Relations Board that that case barred them, in a proceeding brought to review, or enforce, a final administrative order, from considering error in the exclusion of evidence. The Third, Fourth, Eighth and Ninth Circuits all so held: *Hershey Chocolate Corp.* v. *Federal Trade Commission*, 121 F. 2d 968; *National Labor Relations Board* v. *Fairchild Engine & Airplane Corp.*, 145 F. 2d 214; *Wilson & Co.* v. *National Labor Relations Board*, 103 F. 2d 243; *California Lumbermen's Council* v. *Federal Trade Commission*, 115 F. 2d 178, *cert. denied* 312 U.S. 709. Counsel for the administrative agencies successfully argued that the appropriate remedy for error in an evidentiary ruling was an application for leave to adduce the excluded evidence. As an example, because the employer had not made use of this remedy the Fourth Circuit, viewing itself bound by the decision of this Court, reluctantly enforced an order of the Labor Board despite the fact that the Board had "denied the employer a fair opportunity to present important evidence relevant to its defense." *National Labor Relations Board* v. *Fairchild Engine & Airplane Corp.*, *supra* at 215.

Petitioners do recognize that the results achieved by these dismissals below appear to be consistent with one recent circuit court action. In *Texaco Inc.* v. *Federal Trade Commission*, 301 F. 2d 662, *cert. denied* 371 U.S. 882, the Fifth Circuit in a brief *per curiam* decision denied a petition to adduce. However, the Fifth Circuit did not consider and discuss this Court's decision in *Consolidated Edison* or the other courts of appeals decisions cited here. Hence, that decision only accents the conflict existing between the circuits and the lack of clarity in this area of the law.

What is clear is that if this Court had become concerned about the "unfortunate results in relation to . . . administrative procedure" which Judge Prettyman thought might flow from *Consolidated Edison*, it did not change that earlier decision by denying certiorari to review a case holding the contrary. *State of Maryland* v. *Baltimore Radio Show*, 338 U.S. 912. Only a definite statement can change, limit or distinguish *Consolidated Edison*.

3. The Shadow on Due Process

One of the basic protections afforded within the administrative-judicial establishment is the right to review afforded an "aggrieved party." Fundamental concepts of due process are embodied in the right to have agency actions reviewed by the judiciary. But this right, this protection, becomes a will-o'-the-wisp when subject to the vagaries which now surround the protective provisions of Section 19(b) of the Natural Gas Act, and similar statutes.

It is small protection to be assured that the reviewing court shares a petitioner's belief that he has been "denied . . . a fair opportunity to present important evidence relevant to its defense" only to be told that the court will do nothing to rectify the situation because petitioner had not followed some ill-defined avenue of early appeal. This has happened in the cases noted above. It has happened to Texaco and other natural gas producers in somewhat analogous circumstances. *Texaco Inc.* v. *Federal Power Commission*, 290 F. 2d 149.

The confusion presently surrounding this area of judicial review of administrative action shocks the conscience and is damaging to public respect of judicial process.

It can only be removed by a clear statement from this Court, however brief.

4. The Scope of the Present Issues

The conflict, the doubt, the confusion, the multiple actions, the motions and dismissals and new actions described above and arising in this area of the law do not become the lot of the "natural gas company" alone under the Natural Gas Act. The self-same provisions which have been interpreted as providing immediate review in cases such as the present exclusion and withholding of evidence situation are found in many statutes in addition to the Natural Gas Act. Literally hundreds of actions arise daily where these matters are of prime importance to the rights of the participants. Language providing for leave to adduce evidence upon petitions to the court of appeals also appears in the Federal Power Act, 16 U.S.C. 825 (1)(b); National Labor Relations Act, 29 U.S.C. 160(e); Securities and Exchange Act, 15 U.S.C. 77(i)(a); Federal Trade Commission Act, 15 U.S.C. 45(c); Subversive Activities Control Act, 50 U.S.C. 793, and an omnibus agency act, 5 U.S.C. 1037(c).

Costly and time-consuming interlocutory appeals will have to be continued, particularly by those who may eventually seek review in a circuit which has construed this Court's *Consolidated Edison* decision as have petitioners and Judge Prettyman. If these will be "an empty gesture" simple justice dictates that the thousands operating under the statutes noted above be informed that such is the case. Surely continued uncertainty can well have "several unfortunate results in relation to . . . administrative procedure" and the principles of due process. These results should be avoided.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1962

No. 17,608

Texaco Inc., Petitioner

v.

Federal Power Commission, Respondent

No. 17,652

Texaco Inc., et al., Petitioners

v.

Federal Power Commission, Respondent
Public Service Commission of The State of New York, Intervenor

No. 17,700

Sun Oil Company, Petitioner

v.

Federal Power Commission, Respondent

Public Service Commission of The State of New York, Intervenor

Before: Prettyman, Senior Circuit Judge, and Fahy and Burger, Circuit Judges, in Chambers.

ORDER

These consolidated cases came on for hearing on respondent's motions to dismiss the petitions for leave to adduce additional evidence and for a writ of mandamus and were argued by counsel.

Upon consideration whereof and upon consideration of the supplemental memoranda of the parties filed herein, it is

ORDERED by the court that respondent's motions to dismiss petitioners' petitions for leave to adduce additional evidence and for a writ of mandamus are hereby granted and the petitions are hereby dismissed.

Per Curiam

Dated: June 24, 1963

Senior Circuit Judge Prettyman dissents for the reasons stated in his memorandum this day filed.

Each judge reserves the right to file an opinion or a statement of his views at a later date.

United States Court of Appeals
for the District of Columbia Circuit

Nos. 17608, 17652, 17700 — *Texaco Inc., et al. v. F. P. C.*

PRETTYMAN, *Senior Circuit Judge*, dissenting: I agree with my brethren that the granting at this stage of the proceedings of the petitions for leave to adduce additional evidence before the Commission would have several unfortunate results in relation to or affecting administrative procedure. But it seems to me that we are bound by the ruling of the Supreme Court in the Consolidated Edison case.[1] That case involved a petition to review an order of the National Labor Relations Board. In the course of the hearing before the Board the companies, which were the respondents, proffered the testimony of two witnesses, and the hearing examiner rejected the proffer. Before the Court of Appeals the companies contended that this rejection

[1] Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 (1938).

deprived the hearing of its necessary fairness. The contention was pressed in the Supreme Court. That Court said:

> "We agree with the Court of Appeals that the refusal to receive the testimony was unreasonable and arbitrary. Assuming, as the Board contends, that it had a discretionary control over the conduct of the proceeding, we cannot but regard this action as an abuse of discretion. But the statute did not leave the petitioners without remedy. The court below pointed to that remedy, that is, to apply to the Court of Appeals for leave to adduce the additional evidence; on such an application and a showing of reasonable grounds the court could have ordered it to be taken. § 10(e)-(f).[5] Petitioners did not avail themselves of this appropriate procedure.
>
> [5] 29 U.S.C. 160(e)(f)."[2]

The Court declined to sustain the point.

When the *Communist Party* case was before us,[3] the point was made by the Party that the Board had denied production of certain memoranda to which the Party claimed it was entitled under the *Jencks* doctrine. In a memorandum filed in this court by the Board on August 2, 1957, and signed by its General Counsel, its Assistant General Counsel and an attorney from the Department of Justice, one heading was:

> *"Petitioner has waived its claim of error by failing to use the exclusive statutory remedy under Section 14(a)".*

(Section 14(a) of the Subversive Activities Control Act corresponds to Section 10(e)(f) of the National Labor Relations Act and to Section 19(b) of the Natural Gas Act,[4]

[2] *Id.* at 226.

[3] Communist Party of the United States v. Subversive Activities Control Board, 102 U.S. App. D. C. 395, 254 F. 2d 314 (1958).

[4] 52 Stat. 831 (1938), as amended, 15 U.S.C. § 717r(b).

relating to adducing additional evidence.) In its argument under the foregoing heading the Government said:

> "Assuming, *arguendo*, that the failure to order production of the documents in question was error, petitioner is barred from relief because it has failed to invoke its statutory remedy, section 14(a) of the Act. Substantially the same provision in the National Labor Relations Act (29 U.S.C. 160(e)) and the Federal Trade Commission Act (15 U.S.C. 45 (c)) has been held to be an exclusive remedy under circumstances analogous to those here presented. The Supreme Court and several circuits have so held. Not having invoked it, petitioner is now precluded from doing so."

The Government then discussed the *Consolidated Edison* case and named nine cases in which it said Circuit Courts of Appeals had so construed the *Consolidated Edison* case. The Government said that the petitioner's request in that case for production of the documents fitted squarely into the purposes of the procedure set forth in the statutory provisions mentioned. The Government said, "Petitioner is, therefore, barred from the relief sought on the document questions under *Consolidated Edison*, and the other cases cited, *supra*, to the same effect." We agreed with the argument thus made by the Government and so construed the *Consolidated Edison* case in our opinion in the *Communist Party* case.[3] In so doing we pointed to the apparent results of the ruling and said: "There is much force to these various suggestions, and perhaps we misconstrue the opinion of the Supreme Court. But we are bound by the opinion as we read it."

Upon reexamination of the question and a re-reading of the cases cited, I am still of the same opinion. It seems to me that the Supreme Court said quite clearly that if proffered evidence is rejected the profferor has an exclusive remedy, which is a motion in the Court of Appeals for leave to

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[3] *Supra* note 3, 102 U.S. App. D.C. at 403-404, 254 F. 2d at 322-323.

adduce the evidence, and if he does not make that motion he cannot raise the point upon a petition to review the final order. In saying that the profferor of the evidence must make such a motion in the Court of Appeals, it seems to me that the Court must have meant that the Court of Appeals must pass upon the motion; it does not seem to me that the Court could have meant that the profferor should merely file the motion as an empty gesture for the record. This latter is the effect of the contention now made to us by the Commission. Its contention is that the motion to adduce additional evidence can only be made when there is both a final agency order and a petition to review that order filed in the Court of Appeals. The motion should then be made to the court, prior to submission of the case on the merits, the court to dispose of the motion either at that point or in reviewing the order of which review is sought. But, absent the specific motion following a petition to review the final agency order, and prior to submission of the case, the profferor of rejected evidence is forever precluded from raising the issue of the admissibility of that evidence. This suggestion on the part of the Commission seems to me to be the suggestion of a wholly meaningless gesture on the part of the profferor of rejected evidence, and I do not think the Supreme Court meant that it was necessary for such an empty gesture to be made. To say that a motion to adduce the evidence must be made to the Court of Appeals, that such a motion can be made only after a final order is entered by the Commission and a petition to review has been filed, but that the point cannot be part of the petition to review and cannot be argued unless a separate motion has been made in such manner and at such time, makes no sense to me.

Since I am writing for myself alone, I feel free to say that I hope the Supreme Court will agree with my brethren and will conclude that I misconstrue the opinion in the *Consolidated Edison* case.